

FILED

OCT 30 2012

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re

CHRISTIAN ALBERTO ROMERO,

Debtor.

JANIS PANIZZA,

Plaintiff,

vs.

CHRISTIAN ALBERTO ROMERO,

Defendant.

Case No. 11-30367-A-7

Adv. No. 12-2097

Date: October 25, 2012
Time: 9:00 a.m.

MEMORANDUM

The plaintiff asks that a debt be excepted from the debtor's chapter 7 discharge. To do so, the plaintiff must prove that because she did not receive notice of, or have knowledge of, the chapter 7 case, she was unable to file a timely dischargeability complaint. Then, she must prove that the debt arises from a fraud perpetrated by the debtor. See 11 U.S.C. § 523(a)(2)(A) and (a)(3)(A).

I

When a debtor defrauds a creditor, in order to except the resulting liability from a chapter 7 discharge, the creditor must file a timely complaint in the bankruptcy case. Here, the deadline to file a dischargeability complaint was August 5, 2011. This was 60 days after the first date set for the meeting of creditors. See Fed. R. Bankr. P. 4007(c). The plaintiff did not meet this deadline. Her complaint was filed on February 29, 2012.

It is difficult to fault the plaintiff for meeting the August 5 deadline. The debtor did not list her as a creditor in his schedules and she was not given notice of the filing of the bankruptcy case or of the deadline for filing complaints.

However, the plaintiff was informed of the bankruptcy case by the debtor on July 12, 24 days before the deadline to file complaints expired. This can be determined from the face of the complaint and from two emails sent by the plaintiff to the debtor.

Her complaint alleges: "[The debtor] did not inform the Plaintiff of the filing of the bankruptcy until Plaintiff traveled to Sacramento to the Debtor's office. . . ." While the complaint does not mention the date of this office visit, the debtor sent two emails to the debtor, one on July 12 and another on July 13, referring to the visit as being on July 12. See Exhibits K and L.

Hence, it is clear that the plaintiff learned of the bankruptcy case more than three weeks prior to the deadline to file complaints. There is no evidence from the plaintiff that

1 she did any investigation concerning the bankruptcy and its
2 possible impact on her rights against the debtor.

3 Instead, on July 22, 2011, the plaintiff filed suit in Los
4 Angeles Superior Court. That suit appears calculated to not be
5 seen as an attempt to collect a debt from the debtor and run
6 afoul with his bankruptcy. Rather than demanding damages, it
7 asks the state court to enjoin the debtor from conducting
8 business until the debtor had completed the computer programming
9 he allegedly agreed to do for the plaintiff.

10 Only after the debtor's bankruptcy attorney warned the
11 plaintiff not to proceed with the state court suit on August 17,
12 2011, did the plaintiff eventually appear in the bankruptcy case.
13 On December 13, 2011, she unsuccessfully sought relief from the
14 automatic stay in order to proceed in state court. After that
15 motion was denied, this adversary proceeding was filed on
16 February 29, 2012.

17 Even a creditor receiving no formal notice that its debtor
18 has filed a bankruptcy case may have its claim discharged if the
19 creditor nonetheless learns of the petition. Such knowledge
20 imposes an obligation to inquire further. If the creditor fails
21 to inquire further, it is nonetheless on notice of everything to
22 which such inquiry would have led.

23 This is the premise of 11 U.S.C. § 523(a)(3). Section
24 523(a)(3) bars the chapter 7 discharge of a claim omitted from
25 the schedules unless the claim holder "had notice or actual
26 knowledge of the case in time" to file a timely proof of claim or
27 a complaint to except the debt from discharge under 11 U.S.C. §
28 523(a)(2), (a)(4), or (a)(6).

1 In In re Price, 871 F.2d 97 (9th Cir. 1989), the Ninth
2 Circuit concluded that a creditor's claim was discharged when the
3 creditor learned of debtor's petition 58 days prior to the bar
4 date but failed to make inquiry of the deadline and failed to
5 file a timely dischargeability complaint.

6 On the other hand, in Manufacturers Hanover v. Dewalt (In re
7 Dewalt), 961 F.2d 848 (9th Cir. 1992), the Ninth Circuit held
8 that an unscheduled creditor's discovery of a bankruptcy petition
9 seven days prior to the bar date for dischargeability complaints
10 was insufficient notice even though "acting under ideal
11 circumstances and with the utmost of diligence" the creditor
12 might have requested an extension of the bar date.

13 While the court is mindful that the debtor is and was
14 unrepresented by an attorney, it is clear from the record
15 introduced at trial, that the plaintiff has been very proactive
16 in her efforts, both in this court and in state court, to seek
17 redress from the debtor, and her efforts were underway well
18 before the bankruptcy case was even filed.

19 Apart from the numerous phone and email interactions with
20 the debtor, her efforts to get the debtor to perform the contract
21 included filing a complaint in state court, a motion to reopen
22 the bankruptcy case, a motion for relief from the automatic stay,
23 and the adversary proceeding. All of this was done without an
24 attorney.

25 In these circumstances, the court concludes that when the
26 plaintiff actually learned of the bankruptcy case approximately
27 three weeks before the deadline for filing dischargeability
28 complaints, it was incumbent on her to investigate further. Had

1 she done so, she would have learned of the deadline to file
2 dischargeability complaints in time to file a complaint or to
3 request an extension of the deadline. She did nothing.

4 The court concludes that the plaintiff had knowledge of the
5 bankruptcy case in sufficient time to ascertain what impact it
6 might have on her claim but she failed to act diligently.

7 While admitting that her complaint alleges that she learned
8 of the bankruptcy case on July 12, 2011, at trial the plaintiff
9 testified that this allegation was incorrect. She contradicted
10 her complaint by testifying she learned of the bankruptcy after
11 the deadline for filing complaints when she received the debtor's
12 attorney's August 17 letter.

13 However, this testimony was not credible. It was given only
14 after learning that the allegation in her complaint, viewed in
15 light of the two emails she sent in mid-July, meant that she had
16 learned of the bankruptcy three weeks before the deadline to file
17 dischargeability complaints.

18 The court concludes that the plaintiff failed to file the
19 complaint prior to the bar date for such complaints despite
20 learning of the bankruptcy case in time to file a timely
21 dischargeability complaint or to request an extension of that
22 deadline.

23 II

24
25 However, even if the court were to conclude that the
26 plaintiff did not learn of the bankruptcy in time to file a
27 timely dischargeability complaint, the result would not change
28 because she has failed to prove fraud.

1 The plaintiff paid \$5,000 and other consideration to the
2 debtor for computer programming services. He was asked to update
3 a program for a children's game so that it would operate on the
4 latest version of the Windows operating system. This program was
5 sold to the public for use on home computers.

6 The parties disagree as to whether the debtor also agreed to
7 adapt the program so that it, or a scaled down version of it,
8 could be operated on an Internet site without downloading the
9 program onto the user's computer.

10 The parties signed a written agreement on or about December
11 1, 2008, for these services and that agreement supports the
12 debtor's assertion that he did not agree to adapt the program to
13 a web-based game. That contract specified that the debtor would
14 "[c]reate a clone software for the web or [a] stand alone
15 application . . . that works on newer operating systems like XP."
16 [Emphasis added.] See Exhibit G.

17 The debtor delivered the updated stand-alone program on or
18 about August 8, 2009, and hosted it on a website from which
19 purchasers could download the program. See Exhibit F.

20 After August 8, 2009, the plaintiff made clear to the debtor
21 that she also expected him to develop the web-based application.
22 The debtor made some effort to accommodate her but, as he
23 testified at trial, such work would entail many more hours of
24 programming. He would not agree to do that work for just \$5,000
25 and a cut of the sales. Also, he complained that the plaintiff
26 had failed to provide him with the operating manuals for the
27 program.

28 ///

1 The plaintiff produced no expert testimony to the effect
2 that the debtor was unqualified to do the work required by the
3 contract, or that he had failed to do it competently. The
4 plaintiff asks the court to infer from the fact that the debtor
5 did not produce a web-based application of her program that he
6 never intended to do that work. At best, the record convinces
7 the court only that plaintiff and the debtor had different
8 understandings of what work was to be done. When it became clear
9 that they each had a different understanding, the debtor made
10 some misguided efforts to appease the plaintiff. But, those
11 efforts do not convince the court that he agreed in the first
12 instance to provide a web-based application or that he
13 misrepresented his intention to do so.

14 The plaintiff has not proven that the debtor misrepresented
15 his programming abilities or qualifications, or that he
16 misrepresented his intentions to perform the contract as he
17 understood it.

18
19 III

20 For the foregoing reasons, judgment will be entered for the
21 debtor. Counsel for the debtor shall lodge a conforming order.

22 Dated: *30 Oct 2012*

By the Court

23 

24 _____
25 Michael S. McManus, Judge
26 United States Bankruptcy Court
27
28

CERTIFICATE OF MAILING

I, Susan C. Cox, in the performance of my duties as a
judicial assistant to the Honorable Michael S. McManus, mailed by
ordinary mail to each of the parties named below a true copy of
the attached document.

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Dated: October 30, 2012



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